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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 877

BILL HUNNICUTT, Petitioner,

v.

UNITED STATES OF AMERICA.

Petition and Brief for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

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Petition and Brief for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Bill Hunnicutt prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, (R. 99).

This judgment affirmed a judgment of the District Court of the United States for the Northern District of Georgia, Gainesville Division, by which petitioner was sentenced to imprisonment for a term of two years, and to pay a fine of Ten Thousand ($10,000.00). (R. 8).

OPINION BELOW

The opinion of the Circuit Court of Appeals has not been reported in Adance Sheets, but will be found (R. 90).

JURISDICTION

The final judgment denying petition for rehearing was entered July 30th, 1945. (R. 99). The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945, U. S. C. A. Title 28 § 347.

QUESTIONS PRESENTED

Petitioner, together with Clyde Ramey, was indicted in the District Court of the United States for the Northern District of Georgia, Gainesville Division, for the offense of conspiracy. (R. 1.)

In substance the indictment charged:

Commencing on or about January 1, 1944, and continuing down to the date of the indictment November 29, 1944, defendant (petitioner) and Clyde Ramey did - - - - - combine, confederate and agree between themselves and with Claud Guest - - - - -a co-conspirator, but not indicted **and with a person or persons to the Grand Jurors unknown** to violate Title 3 § 2 (a) of the Second War Powers Act and Sugar Rationing Order No. 3 and General Ration Order No. 8 issued by the Administrator Office of Price Administration, pursuant to the provisions of the Second War Powers Act and to defraud the United States by impeding, hampering, interferring with and obstructing a lawful function of a Governmental Agency - - - in the administration of the rules and regulations promulgated under the Second War Powers Act - - - relating to the use and distribution of rationed commodities and for the purpose

of unlawfully acquiring sugar - - - the object - - - being to defeat and frustrate the orderly distribution - - - of sugar, while the United States is at war and to prevent the proper functioning of price administration in the administering of Sugar Rationing Order No. 3 and General Ration Order No. 8, and to unlawfully divert sugar into improper channels - - - - such diversion including the acquiring and acceptance of sugar in a manner not permitted by law - - - - . (R. 1 - 2 - 3.)

The indictment contained twenty-two specified overt acts. (R. 3), among them being that between February 10, 1944, and February 21, 1944, petitioner, Bill Hunnicutt, did take delivery of and have in his possession and under his control 20,000 pounds of sugar, in violation of Sugar Rationing Order No. 3.

That on or about March 15, 1944, petitioner, Bill Hunnicutt, had in his possession 2000 counterfeit No. 3 Sugar Rationing stamps acquired in violation of Sugar Rationing Order No. 3. (R. 5.)

Upon the call of the case before pleading to the merits, petitioner, Bill Hunnicutt, filed a special plea in which he set up:

That on the 13th day of November, 1944, he was indicted in the District Court of the United States for the Western District of North Carolina in the case of United States v. J. P. Aiken and others named in said indictment, not including Clyde Ramey and Claude Guest, who were named in the Georgia indictment as co-conspirators. The indictment in the North Carolina Court charged that petitioner with others named in said indictment, during the period on or about November 1, 1943, and before and since said date and up to and including the filing of said indictment (November 13, 1944), within the jurisdiction of that court, did - - - - knowingly and feloneously conspire, combine, confederate and agree together with each other

and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States of America - - - to violate Sugar Rationing Order 3, of the Second War Powers Act of 1942, with amendments thereto - - - that said defendants during said period of time **and with divers other persons whose names are to the Grand Jurors unknown** did - - - - conspire, plan, and agree to have an unlawfully possess, sell, purchase and acquire for their own use and for the use of others certain sugar ration stamps to be used in the unlawful purchase and sale of - - - - sugar - - - - and that said defendants - - - - agreed, conspired and confederated - - - - to purchase, acquire, and sell quantities of rationed sugar by the use and means of counterfeit sugar coupons, and - - - - each of them did participate in various ways to purchase, acquire and sell by wholesale and retail and otherwise place in the channels of trade for illegal consumption - - - - variouss quantities of rationed sugar by the use of counterfeit sugar coupons which had been illegally acquired.

Among the overt acts charged in the North Carolina indictment was that on or about January 1, 1944, David F. Underwood, Jr. purchased from T. G. Boyd 40,000 pounds of rationed sugar and in exchange therefor gave to said T. G. Boyd counterfeit sugar ration coupons. (R. 17).

That on or about January 1, 1944, Bill Hunnicutt, petitioner, acquired and possessed approximately 100,000 pounds of rationed sugar, for which he gave in exchange counterfeit sugar ration coupons. (R. 18).

The Government filed a response to this special plea and a motion to strike the same upon the ground that the plea showed upon its face that the evidence to support the second indictment would not have been sufficient to convict under the first. That the plea showed upon its

face that the defendants in the overt acts in the two indictments are entirely different. That in the North Carolina indictment it was charged the agreement and conspiracy was formed in North Carolina and in the Georgia indictment it was charged that the agreement and conspiracy were formed in Georgia and that all the overt acts in the Georgia indictment were committed in Georgia. The Court over-ruled the motion to strike the plea, the Government traversed the special plea and the issue was tried before jury.

Petitioner, tendered in evidence a certified copy of the North Carolina indictment with copy of the minutes of that Court indicating the proceedings had thereon.

It showed that he was adjudged guilty and fined $3,000.00 and given one year and one day imprisonment which was suspended and that he was placed on probation for two years, November 15, 1944.

The indictment in the Georgia Court (R. 1) was then introduced as evidence and petitioner was sworn and examined as to the facts. He testified without contradiction that he was the same Bill Hunnicutt indicted and sentenced in the North Carolina case.

That to the North Carolina indictment upon arraignment he entered a plea of nolo contendere and was fined $3,000.00 and given an imprisonment sentence of one year and one day which was suspended and that he was placed on probation for two years and paid the fine. (R. 20-21.)

That David F. Underwood, a conspirator, and defendant in the North Carolina indictment, was sworn and examined as a witness in North Carolina and testified that petitioner furnished him counterfeit coupons with which he purchased sugar from T. G. Boyd. (R. 21).

Petitioner testified that he bought counterfeit sugar

ration coupons at Toccoa, Georgia; that he bought the same number of sugar ration coupons at Toccoa, Georgia, which he delivered to David F. Underwood, a defendant, and a co-conspirator in the North Carolina indictment; that some of these coupons were delivered in Georgia, and that some of them were delivered in North Carolina and that David F. Underwood delivered to him (Hunnicutt) sugar at Clayton, Georgia. The understanding was when peitioner delivered the coupons to Underwood that he, Underwood, was to get sugar at Waynesville, North Carolina, and deliver the same to Hunnicutt, at Clayton, Georgia. (R. 32).

Petitioner testified that he never entered into any conspiracies, other than the one upon which he was tried and convicted in North Carolina and upon which he paid a fine of $3,000.00. (R. 21).

Upon the conclusion of the testimony the trial Judge directed the jury to sign a verdict against the special plea. Petitioner, Bill Hunnicutt, noted an exception to this ruling and this was allowed by the Court. (R. 33). The case then proceeded to trial and Clyde Ramey, the other alleged conspirator, was acquitted, petitioner was convicted and sentence to two years imprisonment and to pay a fine of $10,000.00. He appealed to the United States Circuit Court of Appeals, Fifth Circuit, and that Court affirmed the judgment of the trial Court and denied a petition for rehearing. It is this judgment petitioner seeks to have reviewed on certiorari, and reversed by this Court, and upon which he assigns error.

The questions are:

(1) Whether the indictment in the Georgia Court involved the same crime charged by the indictment in the North Carolina Court?

(2) Would the evidence necessary to convict under the

Georgia indictment have been admissible and sufficient to convict under the North Carolina indictment?

(3) Does a conspicary to violate a law of the United States permit a prosecution and punishment in more than one state where different overt acts occur in different states and by different co-conspirators?

(4) Where a person is indicted under Criminal Code § 37, U. S. C. A. Title 18, § 88, for a conspiracy, and is placed in jeopardy on such indictment, can he be again indicted and placed in jeopardy for the same conspiracy by charging different overt acts?

(5) Is the crime defined in Criminal Code § 37 - U. S. C. A. Title 18 § 88 susceptible of being made more than one crime by overt acts committed by different co-conspirators in different states.

(6) May a special plea of autrefois convict involve a mixed question of law and fact?

(7) Did the trial Court under the facts of this case commit error in directing the jury to find against the special plea and by refusing to allow the jury, under proper instructions to determine the question whether there was more than one conspiracy?

(8) Where the trial Court determined as a matter of law that the special plea was not subject to a motion to strike could a Court thereafter direct a verdict against the special plea if supported by substantial evidence?

Petitioner submits that these are questions of gravity and importance and of such a nature as will warrant the grant of the writ of certiorari to determine them and to correct the errors committed by the trial and Appellate Courts.

STATUTE INVOLVED

The pertinent provisions of Criminal Code § 37 U. S. C. A. Title 18, § 88, defining the crime of conspiring to commit offense against United States are set out in the Appendix page 14, infra.

STATEMENT

The indictment in North Carolina covered the period of time from November 1, 1943, up to and including the date of that indictment November 13, 1944. (R. 14.)

It charged that petitioner, Bill Hunnicutt, together with David F. Underwood and others therein named, "with divers other persons, whose names are to the grand jurors unknown," conspired to commit the offense specified, that is, to violate Sugar Ration Order No. 3 by obtaining and acquiring counterfeit Sugar Ration Coupons and illegally acquiring and possessing sugar. (R. 14).

One overt act was that David F. Underwood, a co-conspirator, and joint defendant in the indictment purchased from T. G. Boyd, 40,000 pounds of ration sugar and in exchange therefor gave counterfeit coupons. (R. 17). In the North Carolina Court Underwood was examined as a witness and gave evidence that he obtained these coupons from petitioner. (R. 32).

Petitioner testified that he in fact furnished to Underwood the coupons with which to purchase from T. G. Boyd the 40,000 poundss of sugar. (R. 20).

Another overt act charged in the North Carolina indictment was that on or about January 1, 1944, petitioner illegally acquired and possessed approximately 100,000 pounds of rationed sugar for which he gave in exchange counterfeit sugar ration coupons. (R. 18).

Petitioner testified that he acquired the sugar ration coupons at Toccoa, Georgia, turned them over to Underwood, some in North Carolina and some in Georgia, and that Underwood delivered to him sugar at Clayton, Georgia, and that he never entered into but one conspiracy—the one upon which he was convicted in North Carolina and paid a fine of $3,000.00. (R. 20-21).

The Circuit Court, (R. 92), stated that the Georgia indictment showed it covered a period of time in part covered by the North Carolina indictment and that in each indictment the conspiracy had to do with violating Sugar Rationing Oder No. 3. That the North Carolina indictment charged that a conspiracy took place in the Western District of North Carolina between the appellant and persons named and persons unknown and that the overt acts set forth in the indictment were allegedly committed within the same District. That the Georgia indictment charged the conspiracy took place in Georgia at divers places unknown to the jurors between the appellant and persons named and persons unknown and that the overt acts set out in the indictment were committed in Georgia. (R. 92).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding as a matter of law that the conspiracy charged in the Georgia indictment was not a continuation of the North Carolina conspiracy and that the two were separate conspiracies.

2. In holding without qualification that the evidence of David F. Underwood that petitioner furnished to him counterfeit ration coupons with which he, Underwood, purchased from T. G. Boyd 40,000 pounds of sugar and the uncontradicted evidence of petitioner to the effect

that he acquired these coupons at Toccoa, Georgia, and delivered them to Underwood, part in North Carolina, and part in Georgia, upon the understanding that he, petitioner, was to receive in exchange for said coupons sugar delivered in Georgia, was insufficient as a matter of law to authorize a jury to find that the conspiracy charged in the indictment in North Carolina and the conspiracy charge in the indictment in Georgia were one and the same.

3. In deciding and in holding that the overt acts set forth in the Georgia indictment in furtherance of the conspiracy would not have been admissible under the indictment in North Carolina, thereby deciding and holding in effect that petitioner could be twice put in jeopardy for the same conspiracy by simply changing the overt acts and the persons committing the overt acts, whereas, petitioner points out that the crime denounced by the Criminal Code § 37, U. S. C. A., Title 18, § 88, consists of a conspiracy to violate a statute and that this crime cannot be multiplied by different overt acts though committed in different states and by different persons and to so hold as a matter of law constitutes error, involving a question of great gravity and importance and one that should be reviewed and corrected by this Court.

4. In deciding and in holding that the evidence would not have warranted the jury in finding that the conspiracy charged in the two indictments was one and the same conspiracy and that petitioner had been placed in jeopardy in North Carolina for the offense upon which he was placed in jeojardy in Georgia.

5. In holding that as a matter of law the evidence was insufficient to submit the question of former jeopardy to the jury.

6. In affirming the judgment of the trial Court in directing a verdict against the special plea.

7. In holding that a jury could convict petitioner as a conspirator and find the other alleged conspirator not guilty, since the two findings are in conflict and wholly inconsistent with each other.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with Short et al v. United States, 91 Fed. (2d) 614 (C. C. A. 4), where it was held that the question raised by a plea of autrefois acquit or convict, as to identity or non-identity of persons and offense, is one of law for court, where record shows either fact on its face, but otherwise is one of fact for jury and that where prior indictment, is indefinite as to offense charged, as in case of alleged conspiracy between named defendants and others to grand jurors unknown, identity of offenses charged in such indictment and present indictment may be shown by parol.

The decision of the Court below is likewise in conflict with United States v. Bates, et al, 141 Fed. (2d) 436, (C. C. A. 7) where it was held that indictment alleging conspiracy having for its object violation of more than one law was not invalid as subjecting defendants to double jeopardy, since an indictment for conspiracy may properly aver a single conspiracy to violate one or more statutes, and proof of conspiracy to violate any one of such statutes will support a conviction and since finding of guilty as to conspiracy involves no substantive offense a judgment bars any subsequent prosecution for any conspiracy to violate any one of such statutes mentioned in indictment growing out of same facts. This decision is irreconcilable on principle with the decision of the Court below in this case. The decision of the Court below is likewise in conflict with Marcus et al v. United States, 20 Fed. (2d) 454 (C. C. A. 3) where it was held in a prosecution for a conspiracy, the government is not limited in its proof of the offense to evidence of the overt acts pleaded. In this case it was conceded by the court below that petitioner

had previously been indicted and punished for a conspiracy to violate the same statutes and rationing orders in the District Court of North Carolina covering in part the same period involved in the indictment in Georgia upon which he was tried and convicted, but the Court held that since the North Carolina indictment did not name the same defendants as were named in the Georgia indictment and alleged overt acts committed in North Carolina that proof of the same overt acts as alleged in the Georgia indictment were not admissible under the North Carolina indictment, whereas, petitioner points out that not only overt acts contained in the Georgia indictment but other overt acts not named in either indictment could have been proved under the North Carolina indictment if a part of the same conspiracy and therefore that he was placed in jeopardy in North Carolina for the same offense for which he was tried and convicted in Georgia.

The Circuit Court in the case at bar has rendered a decision, deciding an important question of law in a way untenable, since, under that decision upon which error is now assigned, it would be possible for the government to indict and try petitioner for the same conspiracy in as many cases as it could show different overt acts in different States, whereas, the crime of conspiracy as embodied in Criminal Code, § 37, P. S. C. A., Title 18, § 88, contemplates a crime against the sovereignty of the United States of America regardless of how many overt acts may be involved in the consummation of the crime of conspiracy and without regard to whether these overt acts occur in one State or in many States.

The question presented in this case is of importance in the administration of the Criminal Laws of the United States relating to the crime of conspiracy and it is of the utmost importance that this Court fix and establish a definite rule on the question as to whether an indictment for conspiracy can be obtained and a defendant convicted as often as different acts constituting an overt act in

pursuance of the conspiracy may occur in consummating the crime, whether these overt acts occur in one State where the conspiracy was formed or whether they occur in other States.

CONCLUSION

The questions raised by the decision below are of substantial public importance. The decision conflicts with the decisions of other Circuit Courts of Appeal. It decides an important question of general law in a way untenable and against the weight of authority. It is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

Statute Involved. "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000,00, or imprisoned not more than two years, or both."

Criminal Code, § 37, U. S. C. A. Title 18, § 88.

BRIEF IN SUPPORT OF PETITION

As pointed out by the Circuit Court, (R. 90) petitioner was convicted and sentenced of the crime of conspiracy under an indictment which charged:

"- - - - commencing on or about January 1, 1944, and continuing down to date of indictment November 29, 1944, (R. 1-7) within the District and Division aforesaid, (Northern District of Georgia) **and at divers other places** to the grand jurors unknown, petitioner and Clyde Ramey as defendants, did in violation of Title 18, § 88, United States Code Annotated (Criminal Code, § 37) - - - - conspire, combine, confederate and agree between themselves and Claude Guest named as a co-conspirator - - - - but not as a defendant, **and with a person or persons to Grand Jurors unknown,** to violate Title 3, § 2, (a) of the Second War Powers Act and Sugar Rationing Order No. 3 - - - -." (R. 90-91).

Among the overt acts charged in the Georgia indictment was that on or about February 10, 1944, within the Northern District of Georgia petitioner had in his possession 4000 number 30 sugar rationing stamps having a value of 5 pounds that were not genuine,

acquired by him in a manner not authorized by law. (R. 3). During the time between February 10, 1944, and February 21, 1944, petitioner took delivery of and had in his possession 20,000 pounds of sugar in violation of Sugar Rationing Order No. 3. (R. 5).

Among the overt acts charged in the North Carolina indictment was that David F. Underwood, a joint defendant in that indictment and a co-conspirator, purchased from T. G. Boyd 40,000 pounds of rationed sugar and in exchange therefor gave counterfeit coupons. (R. 17). On or about January 1, 1944, petitioner, Bill Hunnicutt, illegally acquired and possessed approximately 100,000 pounds of rationed sugar for which he gave in exchange counterfeit sugar ration coupons. (R. 18).

The North Carolina indictment charged that this defendant conspired and confederated with his co-defendanst "and with divers other persons whose names are to the grand jurors unknown" to commit the offense charged. (R. 15).

That the two indictments had to do with a violation of the same Statute is condeded by the Court below. (R. 92). In support of the special plea petitioner under oath testified that he purchased counterfeit sugar rationing coupons at Toccoa, Georgia; that he furnished Underwood, a co-defendant these with which to purchase from T. G. Boyd 40,000 pounds of rationed sugar; that Boyd was going to acquire sugar at Waynesville, North Carolina, to be delivered to him at Clayton, Georgia, and that he never entered into more than one arrangement, agreement or conspiracy to violate that order and that was the one involved in the North Carolina transaction. (R. 20-213 - - - Record 32).

We submit under these facts appearing from the testimony, the evidence of the purchase of the counterfeit sugar ration coupons at Toccoa, Georgia, the delivery of

them to David F. Underwood in North Carolina, and the delivery by him of sugar to Hunnicutt at Clayton, Georgia, would have constituted overt acts admissible in evidence under either the indictment in North Carolina or the indictment in Georgia and would have been sufficient to support a conviction upon either. This being true the special plea should have been sustained and the decision of the Circuit Court is in error. Short v. United States, 91 Fed. (2d) 614.

In case just cited it was held:

"Where prior indictment set up in plea of former jeojardy is indefinite as to offense charged, as in case of alleged conspiracy between named defendants and others to grand jurors unknown, identity of offenses charged in such indictment and present indictment may be shown by parol."

A single agreement to commit an offense does not become several conspiracies because it continues over a period of time.

United States v. Kissell, 218 U. S. 601, 54 L. E. 1168.

" - - - - when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several conspiracies because it envisages the violation of several statutes rather than one."

Braverman v. United States, 317 U. S. 49, 87 L. E. 23.

The Statute under which petitioner was indicted to the effect:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined - - - -," should not be given a construction authorizing a trial and conviction for conspiracy based upon the number of overt acts. While it is true that an overt act is necessary to complete the crime it is not true that the government is confined to proof of the particular overt act set out in the indictment, according to the decision in Marcus et al, v. United States, 20 Fed. (2d) 454. (C. C. A. 3).

The Government may indict and convict a defendant for a conspiracy when completed by one overt act. It cannot re-indict and convict for the same conspiracy upon each overt act.

United States v. Sall, 116 Fed. (2d) 745.

No person can be subjected for the same offense to be twice put in jeopardy.

U. S. Constitution, Amendment 5, U. S. C. A. Constitution, Art. 1 § 10 to Amendment 13, paragraph 2, page 491.

It is submitted that petitioner was tried and convicted twice upon evidence that would have been sufficient to convict upon either indictment. The decision complained of should be reviewed and corrected.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 377

BILL HUNNICUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 89–92) is reported at 149 F. 2d 888.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 29, 1945 (R. 92), and a petition for rehearing (R. 93–95) was denied on July 30, 1945 (R. 96). The petition for a writ of certiorari was filed on August 27, 1945. The jurisdiction of this Court is invoked under Section 204 (a) of the Judicial Code,

as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the conspiracy charged in the indictment was the same conspiracy of which petitioner had previously been convicted in the United States District Court for the Western District of North Carolina.

STATUTES AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or here-

after issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

General Ration Order No. 8, issued by the Office of Price Administration March 25, 1943, as amended (8 F. R. 3783, 9 F. R. 1325, 2746), provides in part:

§ 2.5 *Acquisition, use, transfer or possession of counterfeited or forged ration document.* (*a*) No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged.

§ 2.6 *Acquisition, use, transfer or possession of ration document.* No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

> § 2.8 *Wrongful acquisition, possession, use or transfer of rationed commodity.* No person shall acquire, possess, use, permit the use of, sell or otherwise transfer a rationed commodity except in accordance with the provisions of a ration order. No person shall possess, use, permit the use of, sell or otherwise transfer any rationed commodity acquired in violation of a ration order.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On November 29, 1944, petitioner and Clyde Ramey were indicted in the United States District Court for the Northern District of Georgia in one count charging that, together with one Claude Guest, who was not indicted, and other persons unknown to the grand jury, they conspired to violate Section 2 (a) of the Second War Powers Act, in violation of Section 37 of the Criminal Code, *supra.*

The indictment charged, in substance, that commencing on January 1, 1944, and continuing to the date of the indictment, within the district and "at divers other places to the Grand Jurors unknown,"

the conspirators unlawfully agreed to acquire rationed sugar in a manner forbidden by Sugar Ration Order No. 3 and General Ration Order No. 8. Twenty-two overt acts were alleged, which detailed two transactions on February 10 and March 18, 1944, in which the conspirators undertook to acquire and did acquire 30,000 pounds of sugar through the use of counterfeit sugar ration stamps. (R. 1–7.)

The evidence at petitioner's jury trial, briefly stated, established that on two occasions, one on February 10, 1944, and the other a few weeks later, petitioner, pursuant to arrangements made with Guest, furnished him with sugar ration coupons and money for the purpose of acquiring rationed sugar (R. 51–54, 57–60); that the ration coupons were counterfeit (R. 72–73); that Guest purchased 30,000 pounds of sugar from a wholesale dealer in Toccoa, Georgia, falsely representing that the sugar was for two local stores (R. 33–37, 39–40, 42–50, 51–54); that the sugar was transported from the seller's place of business in trucks furnished by petitioner (R. 51–53); and that defendant Ramey assisted Guest in acquiring the sugar (R. 43–45, 53). The jury acquitted Ramey, but convicted petitioner (R. 8), and he was sentenced to imprisonment for two years and to pay a fine of $10,000 (R. 8–9). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 89–92).

The sole question presented by the petition for a writ of certiorari relates to petitioner's special plea of double jeopardy (R. 10–18), which he filed before

pleading to the merits, urging that he had previously been convicted of the same conspiracy in the United States District Court for the Western District of North Carolina. The Government's motion to strike the plea on the ground that it was clear from the face of the two indictments that different offenses were involved, was overruled (R. 18–19), and the court impaneled a special jury to try the issue presented by the plea (R. 19).

The court received in evidence a copy of the North Carolina indictment and of the minutes of the North Carolina district court (R. 12–19). That indictment (R. 14–18) charged that during the period from November 1, 1943, to November 13, 1944, within the Western District of North Carolina, petitioner and seven other named persons, not including either Guest or Ramey who were named as conspirators in the Georgia indictment, unlawfully conspired to violate Sugar Ration Order No. 3 and the Second War Powers Act by purchasing and selling rationed sugar through the use of counterfeit sugar ration stamps. Seven overt acts were alleged describing various transactions on or about January 1, 1944, in which vast quantities of sugar were bought and sold illegally. Overt act VI, which related to petitioner, charged that on or about January 1, 1944, he illegally acquired 100,000 pounds of rationed sugar in exchange for counterfeit ration coupons (R. 18). Petitioner pleaded *nolo contendere* to the North Carolina indictment, and the court, after hearing evidence, entered judgment that petitioner pay a fine

of $3,000; execution of a sentence of one year and a day was suspended, and petitioner was placed on probation for two years (R. 13–14).

The only other evidence adduced at the trial of the special plea was petitioner's testimony that the only witness in the North Carolina case who connected him with the conspiracy involved there was one Underwood, who was a co-defendant in that case (R. 21). According to petitioner, Underwood testified in the North Carolina case that at times before January 1, 1944 (R. 21), petitioner, on one occasion in North Carolina and on another in Georgia, furnished Underwood with counterfeit sugar ration coupons and that Underwood, using the coupons, purchased between 50,000 and 80,000 pounds of sugar in North Carolina and delivered it to petitioner in Georgia (R. 21–27). Petitioner testified that there was no evidence in the North Carolina case relating to his transactions with Guest and Ramey, who were charged as co-conspirators in the Georgia indictment, and upon being questioned *seriatim* as to each of the twenty-two overt acts alleged in the Georgia indictment, he testified that there was no evidence in the North Carolina case as to any of these transactions (R. 27–30).

On this evidence the trial court held as a matter of law that petitioner had failed to show that the offenses charged in the North Carolina and Georgia indictments were identical, and accordingly directed the jury to return a verdict against the plea (R. 33).

ARGUMENT

We are unable to agree with petitioner (Pet. 14–17) that the offenses charged in the North Carolina and Georgia indictments are identical or that the district court erred in directing the jury to find against petitioner's special plea of double jeopardy. It does appear from the face of the indictments that they are similar in that they cover substantially the same period of time and the object of the conspiracy in each case was to procure rationed sugar through the use of counterfeit sugar ration stamps. On the other hand, the North Carolina indictment fixes the Western District of North Carolina as the situs of the conspiracy involved in that case, while the instant indictment recites that the conspiracy existed in the Northern District of Georgia and at "divers other places to the Grand Jurors unknown," and the overt acts alleged, with one exception,[1] occurred in Georgia. Likewise, with the exception of petitioner, there is a complete lack of identity between the conspirators named in the two indictments. Further, the North Carolina indictment recites overt acts alleged to have occurred in North Carolina on or about January 1, 1944, while the Georgia indictment alleges overt acts which occurred in Georgia in February and March 1944. There is no need, however, to rely upon these

[1] Overt act 16 recites that Ramey delivered to Guest the sum of $65.00 to be used in purchasing sugar for petitioner, but it fails to fix the locale of the transaction (R. 6). The evidence adduced at the trial showed, however, that this, too, occurred in Georgia (R. 52–54).

differences alone to support the conclusion that the two indictments relate to distinct conspiracies, for, in our view, petitioner's testimony at the hearing in this case on the plea of double jeopardy conclusively demonstrates that each indictment involved a different unlawful agreement between different persons and that different overt acts were committed in execution of the conspiracies.[2]

The evidence which we have summarized, *supra*, pp. 6–7 shows that petitioner's connection with the North Carolina conspiracy was solely through Underwood, a defendant in that case. At some time prior to January 1, 1944, petitioner furnished Underwood counterfeit stamps and Underwood procured the sugar from his co-conspirators in North Carolina and delivered it to petitioner. Petitioner specifically denied that Ramey or Guest were shown to be members of the North Carolina conspiracy or that any of the evidence in that case related to the transactions alleged as overt acts in the Georgia indictment. And, conversely, there is absent from the proof in this case any evidence linking any of the North Carolina defendants, except petitioner, or any of the trans-

[2] This is implicit in petitioner's testimony that he was a member of the North Carolina conspiracy (R. 21) and that he had never conspired with Guest or Ramey, as charged in the Georgia indictment (R. 75). If Guest and Ramey were not co-conspirators with petitioner in the North Carolina case, as must be inferred from petitioner's testimony that he never conspired with them, it hardly can be said that the Georgia indictment charged the same offense as the North Carolina indictment.

actions involved in the North Carolina case with the conspirators or transactions upon which petitioner's Georgia conviction is predicated. In these circumstances, we think it plain that the events, the time, and the parties are different in each case. The evidence in the North Carolina case that before January 1, 1944, petitioner delivered counterfeit stamps to Underwood and that Underwood procured the sugar in North Carolina would not have established the conspiracy charged in the Georgia indictment, and the evidence showing the Georgia conspiracy (*supra*, p. 5) would not have supported a conviction under the North Carolina indictment. Since, in our view, the evidence permitted only one conclusion, we think the district court properly directed the jury to find against petitioner on his special plea of double jeopardy.

Petitioner is mistaken in his belief (Pet. 11) that the decision below is in conflict with *Short* v. *United States*, 91 F. 2d 614 (C. C. A. 4). In that case, the Circuit Court of Appeals for the Fourth Circuit found an issue of fact to exist as to the identity of the two conspiracies involved, and it accordingly held that the issue should have been submitted to the jury.[3] Since in this case, as we have shown, the evidence left no doubt as to the distinctness of the two conspiracies and since there was no conflicting

[3] In the *Short* case, overt acts in North Carolina were alleged in the indictment returned in Virginia and vice versa. Moreover, two identical defendants were named in both indictments.

evidence, the district court properly directed a verdict against petitioner's plea.[4]

CONCLUSION

For the reasons stated, we respectfully submit that the affirmance of the judgment of conviction by the court below was free of error. The case presents no conflict of decisions or important issue of law, and the petition for a writ of certiorari should therefore be denied.

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[4] Neither *United States* v. *Bates*, 141 F. 2d 436 (C. C. A. 7), remanded for further proceedings, 323 U. S. 15, nor *Marcus* v. *United States*, 20 F. 2d 454 (C. C. A. 3), which petitioner asserts are also in conflict with the decision below (Pet. 11), involved a question of identity of offenses such as is presented by this case.

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